



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO. 145 OF 2014**

**ISHMAEL K. T KEITANY.....APPLICANT**

**VERSUS**

**ROSE CHRISTINE RONO.....DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 10<sup>th</sup> September, 2021 in which the Plaintiff/Applicant seeks leave of Court to file a further list of documents. The Applicant contends that he filed a supplementary list of documents which were expunged from the court record for unknown reasons. The Applicant further contends that the list in the further list of documents sought to be introduced are crucial and will help this court to determine this case. The Applicant argues that the further list of documents will not prejudice the Defendant/Respondent.
2. The Applicant's application was opposed by the Respondent based on a replying affidavit sworn on 29<sup>th</sup> September, 2021. The Respondent contends that the Applicant's application is incompetent in that the affidavit in support of the same has been sworn by an Advocate and that the documents sought to be introduced were in possession of the Applicant who should have filed them together with the plaint.
3. The Respondent further contends that there was no supplementary list filed by the Applicant which was expunged as alleged. The Respondent argues that the Applicant is seeking to ambush her after hiding the said document and is only seeking to produce them after four witnesses have testified. The Respondent argues that if the said documents are allowed, they will greatly prejudice her case.
4. The parties were directed to file written submissions. The Applicant filed his submissions on 20<sup>th</sup> January, 2022. The Respondent filed here submissions dated 10<sup>th</sup> November, 2021. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has demonstrated that he has grounds for admission of additional documents.
5. To begin with, the affidavit in support of the application has been sworn by the Advocate for the Applicant who has no personal knowledge as to why the Applicant did not present the said documents for filing. Because of this lack of personal knowledge, the Advocate claims that the documents which were filed as supplementary list of documents were expunged from the court record for unknown reasons. I have perused the court file and notice that the Applicant filed a supplementary list of documents on 14<sup>th</sup> March, 2018. This list and documents are still in the file.
6. The record of proceedings does not show whether documents were expunged. On 24<sup>th</sup> June, 2019, the Advocate for the Applicant indicated to court that the Applicant had filed documents which could not be seen in the court file. He indicated that he was going to follow up the issue with the registry. There was no truth in this statement as both the original list of documents and supplementary list are in the court file. On 3<sup>rd</sup> June, 2021, the Applicant's advocate applied to stand down the Plaintiff's fourth witness to enable him file a document which he said was crucial to the case. This application was opposed by the Respondent's Advocate. The court delivered an instant ruling holding that the Applicant had filed a supplementary list of documents in 2018 and that no reason had been given why the said document was not produced.
7. It is therefore clear that the filing of the present application is an abuse of the process of court and is meant to circumvent the court ruling of 3<sup>rd</sup> June, 2021.
8. The documents sought to be introduced consist of evidence. The advocate who swore the affidavit did not know why the Applicant withheld them. It is only the Applicant who would have explained why the documents were not given to his Advocates for filing. Order 19

Rule 3(1) of the Civil Procedure Rules states as follows:-

**3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.**

9. In the case of Stephen Bernard Oduor -V- Afro Freight Forwarders (2002) eKLR it was held as follows:-

**“Before making final orders however, this court must note with dismay that the Replying Affidavit was drawn and sworn by one Oruko Nyawida Advocate who is the Counsel for the Plaintiff in conduct of this case. The mere fact that he acts for the Plaintiff in no way give him authority to swear Affidavit nor does he on the Affidavit claim to have been specifically given authority by the Plaintiff to swear the said affidavit. In my opinion therefore, the Replying Affidavit was sworn by a stranger in view of the fact that the deponent fails to reveal his source of authority to swear it. The failure in my view is substantial defect which renders the said Affidavit incompetent and therefore amenable to striking out. I accordingly hereby strike it out....**

**In conclusion, learned Advocates have again been advised by this court to avoid placing themselves in the position of parties themselves. Unfortunately, they appear to have ceased from this despicable practice which is contemptuous and, in my opinion, amounts to an abuse of court process. It should stop to bring the point home, this court will in future go out its way to discourage the practice.**

**While there are special occasions when an advocate may be called upon to swear an affidavit in a case he is conducting and will be excused or allowed to do so, the swearing of the affidavit in this is in my judgment not excusable.”**

10. The Applicant’s Advocate is seeking to introduce a completely different set of documents from those filed with the plaint and the supplementary documents. This explains the reason why the Advocate falsely claims that the supplementary list of documents was expunged from the court for unknown reasons.

I find that this application is incompetent and is an abuse of the process of the Court. The application dated 10<sup>th</sup> September, 2021 is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated, signed and delivered at Eldoret on this 21<sup>st</sup> day of April, 2022.**

**E. OBAGA**

**JUDGE**

In the virtual presence of;

Ms. Ketta for Plaintiff/Applicant

Court Assistant -Albert

**E. OBAGA**

**JUDGE**

**21<sup>ST</sup> APRIL, 2022**